Supreme Court, U.S.
FILED
JAN 15 1983
ALEXANDER L. STEVAS
CLERK

No. 81-1857

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OREGON, *Petitioner*,

v.

JAMES EDWARD BRADSHAW, *Respondent*.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

"Does a police officer violate the limits of custodial interrogation established in *Edwards* v. *Arizona*, 451 U.S. 477 (1981) where he reinterrogates an arrestee concerning his culpability after the arrestee had previously invoked the right to counsel and asked the limited procedural question 'What is going to happen to me now?' "

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Oregon Court of Appeals reversing Bradshaw's conviction is reported at 54 Or. App. 949, 636 P.2d 1011 (1981). The order of the Oregon Supreme Court denying the State's petition for review is reported at 292 Or. 568, 644 P.2d 1129 (1982). these opinions are set forth in the Petition for Certiorari at 10-14.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, § 1:

". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTORY PROVISIONS INVOLVED

Oregon Revised Statutes 471.410(2), (3)(a):

"(2) No person other than his parent or guardian shall sell, give or otherwise make available any alcoholic liquor to any person under the age of 21 years. A person violates this subsection if he sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person will violate this subsection.

"(3) Upon violation of subsection (2) of this section, the court shall impose a mandatory minimum sentence as follows:

"(a) Upon a first conviction for the offense, a fine of $200."

Oregon Revised Statutes 471.990(1):

"(1) Except where other punishment is specifically provided for, violation of any provision of this chapter is a misdemeanor."

Oregon Revised Statutes 161.565:

"An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture, fine and forfeiture or other civil penalty. Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

Oregon Revised Statutes 161.575:

"(1) Any violation defined in the Oregon Criminal Code is expressly designated in the section defining the offense. Any offense defined outside this code which is punishable as provided in ORS 161.565 shall be considered a violation.

"(2) Violations are not classified."

Oregon Revised Statutes 161.635(3):

"(3) A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding $250."

Oregon Revised Statutes 133.310(1)(a)(b):

"(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed:

"(a) A felony, a Class A misdemeanor or an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class A misdemeanor, or a major traffic offense as defined in ORS 484.010(5)'

"(b) Any other offense in the officer's presence except traffic infractions as defined in ORS 153.305."

Oregon Revised Statutes 161.615(1):

"Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following maximum limitations:

"(1) For a Class A misdemeanor, 1 year."

Oregon Revised Statutes 484.010(5):

"(5) 'Major traffic offense' means a violation of any of the following provisions of law or a city ordinance conforming thereto:

"(a) Reckless driving as defined in ORS 487.550.

"(b) Driving while under the influence of intoxicants, as defined in ORS 487.540.

"(c) Failure to perform the duties of a driver involved in an accident or collision, as defined in ORS 483.602 (1) and (2) and 483.604.

"(d) Driving while suspended or revoked, as defined in ORS 487.560.

"(e) Fleeing or attempting to elude a police officer, as defined in ORS 487.555.

"(f) Driving after being declared to be a habitual offender, as set forth in ORS 484.740."

Oregon Revised Statutes 487.550(2):

"(2) Reckless driving is a Class A misdemeanor."

Oregon Revised Statutes 487.540(2):

"(2) Driving while under the influence of intoxicants is a Class A misdemeanor."

Oregon Revised Statutes 487.560(5), (6):

"(5) Except as provided in subsection (6) of this section, driving while suspended or revoked is a Class A misdemeanor.

"(6) Driving while suspended or revoked is a Class C felony if the suspension or revocation was the result of a finding that the person is an habitual traffic offender under ORS 484.730 or of a conviction for any of the following offenses:

"(a) Any degree of murder, manslaughter, criminally negligent homicide or assault resulting from the operation of a motor vehicle.

"(b) Any crime punishable as a felony with proof of a material element involving the operation of a motor vehicle.

"(c) Failure to perform the duties of a driver involved in an accident or collision which results in physical injury or death to any person.

"(d) Reckless driving.

"(e) Fleeing or attempting to elude a police officer.

"(f) Driving while under the influence of intoxicants."

Oregon Revised Statutes 487.555(4):

"(4) Fleeing or attempting to elude a police officer is a Class A misdemeanor."

Oregon Revised Statutes 484.740:

"Except as provided in ORS 484.735(2), it shall be unlawful for any person to operate a motor vehicle in this state while the order of the court prohibiting such operation remains in effect. A person who violates this section commits a Class C felony."

STATEMENT OF THE CASE

A. Statement of Facts:

On Sunday, September 14, 1980, Lloyd Reynolds' body was found in his wrecked pickup truck along the coastal highway near Rockport, Oregon (J.A. 6, 11; Tr. 13, 17).[1] Gerald Hays, a state police corporal, commenced an investigation. Denver Buxton, a Rockaway police officer, advised Hays that Bradshaw had previously reported being assaulted while drinking at the deceased's cabin on Saturday evening (J.A. 7; Tr. 13). Kimberly Asher, the deceased's girlfriend, told Hays she had not been present at the cabin on Saturday evening (J.A. 10; Tr. 16).

On Sunday evening, Officers Hays and Buxton proceeded to Reynolds' cabin and conducted a warrantless search of his

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[1] "J.A." refers to the joint appendix; "Tr." refers to the transcript of the trial court proceedings; and "Ex.2" refers to Pretrial Exhibit 2, the transcript of Bradshaw's tape-recorded statement to Corporal Hays on September 14, 1980; "Ex.11" refers to Trial Exhibit 11 containing police information reports.

personal effects (J.A. 6-7; Tr. 13). Bradshaw, who resided with his grandmother Irma Stockdale at the group of cottages, approached the officers (J.A. 7; Tr. 13). Hays told defendant why he was there and asked about defendant's knowledge of Reynolds (J.A. 8; Tr. 14). Bradshaw indicated he had purchased alcoholic beverages that he and Reynolds had consumed on Saturday (Tr. 117). He showed Hays two empty whiskey bottles (Tr. 117). Hays noticed "numerous six-packs of empty beer bottles" (Tr. 119). Bradshaw indicated others joined them and he had been assaulted in Reynolds' cabin on Saturday night by a man named "Bash" (J.A. 8-9; Tr. 14-15). Bradshaw claimed the deceased, Kimberly Asher, Cynthia Reynolds and an unidentified man had also been present (J.A. 8-9; Tr. 14-15).[2]

Shortly thereafter, David Bash arrived at the cabin (J.A. 10; Tr. 6). He told the officers he had not been present at Reynolds' cabin on Saturday night (J.A. 10; Tr. 6). Based on this inconsistency, Hays asked Bradshaw to accompany him to the Rockaway Police Department for a taped interview (J.A. 10; Tr. 16). Hays, who considered defendant a suspect, advised him he was not in custody and was free to leave (J.A. 10; Tr. 17). Bradshaw voluntarily accompanied Hays to the station (J.A. 10; Tr. 16).

At the police station, Hays advised Bradshaw of his *Miranda*[3] rights and the nature of the investigation he was conducting (J.A. 46; Ex.2, at 1-2). Bradshaw, a school dropout, acknowledged understanding these matters and that he was free to leave (J.A. 45-47, 55; Ex.2, at 1-3, 10). He indicated his plan to leave for St. Helens that evening and noted he had consumed four beers earlier in the day (J.A. 45, 47; Ex.2, at 1, 3).

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[2] In a previous contact with Officer Buxton, Bradshaw described his version of the assault in Reynolds' cabin, and asked if the officer would bring any charges against him for buying alcohol for Reynolds, a 20-year old minor (J.A. 60; Ex. 2, at 14).

[3] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

Hays, accompanied by Officer Buxton, questioned Bradshaw about Saturday's events (J.A. 48, 56; Ex.2, at 3, 11). Bradshaw responded that he and Reynolds drank beer and whiskey in Reynolds' cabin (J.A. 48-49; Ex.2, at 4). Others had joined them, an argument ensued, and someone struck Bradshaw in the head knocking him unconscious (J.A. 48-53, 58; Ex.2, at 3-8, 12). Larry Moorehead, a friend of Mrs. Stockdale, called the police (J.A. 56; Ex.2, at 11). Officer Buxton responded, called an ambulance, and Bradshaw was taken to a hospital for treatment (J.A. 56; Ex.2, at 11). The treating physician indicated Bradshaw's skull was nearly cracked (J.A. 54; Ex.2, at 9).

Bradshaw admitted buying the beer and whiskey consumed by Reynolds. He indicated a willingness to face prosecution for furnishing liquor to a minor, in view of the fact that Reynolds was under the legal drinking age (J.A. 59-60; Ex.2, at 13-15). Halfway through the interview, Bradshaw asked if he would be charged. Hays stated, "This is possible . . . It's very possible." (J.A. 60; Ex.2, at 14-15).

Hays continued questioning Bradshaw (J.A. 60; Ex.2, at 15). Bradshaw denied ever riding in Reynolds' truck, and he admitted that his right to drive in Oregon had been revoked (J.A. 62-65; Ex.2, at 16-18). He declared himself ready to help the police in their investigation into Reynolds' death and suggested that Reynolds may have met with "foul play" at the hands of the person who allegedly had struck Bradshaw (J.A. 66-69; Ex.2, at 21-23).

At this point, Hays placed Bradshaw under arrest for furnishing liquor to a minor. Hays told him he was no longer free to leave and readvised him of his *Miranda* rights (J.A. 70-71; Ex.2, at 24-25).

The interview concluded after the following confrontation:

> "Q. [BY HAYS] * * * Okay. We've contacted three out of the four people you indicated that was at the apartment last night. All of them have witnesses indicating they were not there. And it's going to be my theory that you were driving that pickup, ran off the road because you

had too much to drink, got scared because you—I'm just giving you my theory. You got scared because you're a habitual offender, and a result of that accident is how you hurt your head. Then you came back and called the police. This is my theory only. It may not be right, but I'm just telling you how I feel about it. Am I close?

"A. [BY BRADSHAW]: No. You're one hell of a long ways from it.

"Q. Okay. Were you in the vehicle last night?

"A. No, I was not.

"Q. Even as a passenger?

"A. I've got witnesses to that.

"Q. Okay, can you tell me who the witnesses were?

"A. For one, my grandmother and Larry Moron or Moorehead, whichever one his last name may be.

"Q. (Inaudible)

"A. And I do want an attorney before it goes very much further." (J.A. 71-72; Ex.2, at 25-26).

Hays immediately terminated the conversation and handcuffed Bradshaw (J.A. 14, 16; Tr. 20, 22). Shortly thereafter and while still at the police station, Bradshaw asked Hays, "Well, what is going to happen to me now?" (J.A. 16; Tr. 22). According to Hays' testimony, the following occurred:

"* * * I says[*sic*] 'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say—because—since you have requested an attorney, you know, it has to be at your own free will.' I says[*sic*] 'I can't prevent you from talking, but you understand where your place—you know, where your standing is here?' and he agreed. He says[*sic*] 'I understand,' and—you know, and we had conversation from then on. . . ." (J.A. 16; Tr. 22).

While still in the station, Hays told Bradshaw "where he was going and what he would be charged with." (J.A. 17; Tr. 23).

Hays put Bradshaw in the front seat of the patrol car "so we could talk" (J.A. 17; Tr. 23). Hays drove him to the Tillamook County Jail. While enroute, Hays reopened his theory of culpa-

bility and suggested that Bradshaw take a polygraph examination (J.A. 17; Tr. 23). Hays testified:

> * * * * * [W]e talked about, again, the theory that I had mentioned on the tape about what had happened, the accident, and whatnot, and he says—I made the statement—I says, 'Well, I can have a polygraph examiner come down and talk to you tomorrow and we can clear this matter up and find out actually what happened.' I think he made something—he said, 'What do you mean, a polygraph examiner?' and I said, 'Well, a lie detector test,' and I explained it to him and said, 'Okay, clear this matter up,' and these statements, among others, were made. . . . [T]hese statements were made while in [sic] route to the county jail in the patrol car. We had a conversation all the way there and we talked about several things, the fact that he was from Missouri and how long he had been back and he had lived in St. Helens and he knew several police officers from St. Helens, I believe, and we had general conversation all the way to the county jail." (J.A. 17-18; Tr. 23-24).

Bradshaw was lodged in the Tillamook County Jail on the charge of furnishing liquor to a minor "in lieu of $10,300 bail." (Ex.11, Police Information Report, Officer Hays, dated 9-11-80, p.4).

Hays testified Bradshaw wanted to contact Irma Stockdale, who was also leaving for St. Helens that evening, and he had "a couple of other things to do" (J.A. 18; Tr. 24). He "believed" Bradshaw may have had an opportunity to make a phone call to a lawyer, but he did not know one (J.A. 18; Tr. 24). A police officer contacted Mrs. Stockdale and informed her that Bradshaw was in jail (J.A. 19; Tr. 25).

On Monday morning, September 15, 1980, Corporal Hays briefed Trooper William Rainey, a polygraph examiner, about the facts of the investigation, but did not tell him that Bradshaw had previously requested an attorney (J.A. 20-21; Tr. 26).

Late that morning, at the county courthouse, Bradshaw submitted to a polygraph examination administered by Rainey. Rainey advised Bradshaw of his *Miranda* rights.

Bradshaw executed a written consent to the examination (J.A. 30-33; Tr. 42-45). After the examination, Rainey told Bradshaw that in his opinion, Bradshaw had not been truthful in his answers to questions about having driven Reynolds' truck. Bradshaw thereupon admitted to Rainey that, on September 13, he had passed out behind the wheel of the Reynolds truck while driving Reynolds to a party, after the two had consumed a considerab'e amount of alcohol at Reynolds' cabin (J.A. 33-35; Tr. 45-47).

Several hours later, at 1:30 a.m., Bradshaw was arraigned before the Tillamook Justice of the Peace on the furnishing liquor to a minor charge with bail set at $10,300 (Ex.11, Custody Report, Officer Hays, dated 9-15-80, p.1). That same afternoon, the Tillamook County District Attorney directed the police to charge Bradshaw with manslaughter, felony driving while revoked and driving under the influence (Ex. 11, Police Information Report, Officer Hays, dated 9-17-80, p.1-2; Officer Stephenson, dated 9-16-80, p.2). Bradshaw was then arraigned on the more serious charges arising from his confession before the Justice of the Peace after business hours, at 7 p.m., on the evening of the same day (Ex. 11, Police Information Report, Officer Nicholson, dated 9-17-80, p.1), and bail was increased to $25,300 (Ex.11, Police Information Report, Officer Stephenson, dated 9-16-80, p.1).

B. Procedural Facts:

At the pretrial *Miranda* hearing, Bradshaw contended his statements were obtained in violation of his rights under the Fifth and Fourteenth Amendments. He contended (1) the police officers improperly questioned him after he invoked the right to counsel, (2) his post-invocation statements to the officers were inadmissible, and (3) his invoked right to counsel could not be waived until an attorney had been provided (J.A. 14-15, 21-22; Tr. 20-21, 27-28).

In colloquy, the trial court reasoned that a waiver was possible if the state merely established Bradshaw "voluntarily changed his mind" (J.A. 15, 38; Tr. 21, 55). The court applied

this standard, rather than the waiver standard announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (J.A. 42-43; Tr. 81-82).

At the conclusion of the pretrial hearing on the admissibility of Bradshaw's statements to Trooper Rainey, the trial court ruled as follows:

> "I find that the statements made to Officer—or, to Corporal Rainey were admissible. The evidence establishes that there were no threats, promises, or inducements, that the defendant was properly advised of his rights and that he did understand them and I also find that the evidence supports a conclusion that although Mr. Bradshaw had indicated his intent to have an attorney before it goes very much further, that within a short time after he made that statement he was initiating conversations in spite of the officer's replying to him, 'I can't talk with you.' and I think that when I look at the total context of this, that there was, in fact, a change of this man's mind, that it was not brought on by any persuasion or argumentative kind of statements that were improper in any way and that the statements finally made to Officer Rainey—or, to Corporal Rainey were voluntary and followed a waiver and a knowing waiver of his right to remain silent. . . ." (J.A. 42-43; Tr. 81-82).

During Bradshaw's nonjury trial, his admissions to Rainey were introduced into evidence by a stipulation that Rainey's testimony at trial would be the same as it was in the pretrial hearing (Tr. 147-149). Bradshaw was found guilty of first degree manslaughter, driving under the influence of intoxicants, and driving while his license was revoked.

On appeal, the Oregon Court of Appeals held that Bradshaw's statements to Trooper Rainey were erroneously admitted into evidence. The Oregon court based its conclusion upon this Court's decision in *Edwards* v. *Arizona*, *supra*. The Court of Appeals reasoned that Bradshaw had not knowingly, intelligently and voluntarily waived the right to counsel:

> ". . . We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or any-

> thing other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, [Hays] clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.
>
> "The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. . . ." *State* v. *Bradshaw*, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1982) [Petition for Certiorari, at 13].

The Oregon Supreme Court summarily denied the state's petition for review.

SUMMARY OF ARGUMENT

I

Under the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), when an accused requests counsel, the authorities may not interrogate him unless the accused initiates further dialogue about the investigation. Bradshaw believes "initiation" should be defined as follows:

> "Initiation" is a statement by an accused that clearly indicates an intentional abandonment of the right to counsel, an assertion of competence, and a definite willingness to represent himself in discussions with authorities concerning the substantive criminal investigation.

Under this definition, an arrestee's statement about (1) his independent statutory or constitutional rights other than the right to counsel, (2) an irrelevant matter, or (3) a procedural matter normally attendant to arrest and detention should not be deemed initiation. Where the arrestee does not specifically ask to reopen the substantive criminal investigation, the authorities should not be permitted to interrogate him.

In the present case, Bradshaw's question, "Well, what is going to happen to me now?" was not initiation. It was a limited request about procedures normally attendant to arrest or an inartful request about how to contact counsel. The Oregon

Court of Appeals properly concluded that Corporal Hays took unfair advantage of the limited remark, and improperly reopened the substantive criminal investigation. The appellate court's decision should be affirmed.

II

When an accused requests counsel, *Miranda* imposes a *per se* bar on further interrogation in the absence of counsel. The accused has the right to consult with counsel and have him present. The "defendant-initiation" requirement is a necessary part of the right to counsel protections. The qualified *per se* rule in *Edwards* fairly interprets *Miranda's* basic premises, safeguards the right to counsel, provides a "bright line" to guide the lower courts and generates consistent precedent and articulates clear guidance for law enforcement officials.

In practice, the rule has eliminated the three divergent approaches of the lower courts. After *Edwards*, the lower courts have been able to consistently distinguish between defendant-initiated waivers and improper police-initiated interrogation. The practical utility of the rule attests to its fundamental soundness.

III

In the third argument, Bradshaw has proposed a series of rules to further clarify initiation, and to clarify the permissible scope of police behavior in custodial encounters. Bradshaw believes these suggestions are consistent with the basic premises of *Miranda* and *Edwards*.

IV

It will be assumed for purposes of argument that Bradshaw "initiated" the discussions with Officer Hays triggering the use of the totality of circumstances analysis so strongly advanced by the Attorney General. A review of the record negates any finding of a voluntary and knowing waiver:

(1) Officer Hays, unable to establish probable cause to arrest Bradshaw on the felony charges for the death of

Reynolds, accused Bradshaw of the killing and then illegally arrested Bradshaw for furnishing alcohol to a minor. There was no statutory authority to arrest him under Oregon law.

(2) Bradshaw asked for the assistance of counsel but was never given the opportunity to call either an attorney or his grandmother, who was leaving town. The police actually contacted Bradshaw's grandmother to prove Bradshaw was lying about the events surrounding Reynold's death but never told her of her grandson's request for help.

(3) After the illegal arrest and Bradshaw's remark, "Well, what is going to happen to me now?", Officer Hays suggested to Bradshaw that he take a "lie" detector test.

(4) The authorities did not promptly present Bradshaw before a magistrate on the pretext furnishing violation. he was illegally detained from Sunday evening through Monday. Eventually, at 7:00 p.m. on Monday night, he was arraigned on the felony charges that arose from the polygraph confession.

(5) During all of this time Bradshaw, an apparent alcoholic who had received a serious head injury, was without friends, family or counsel.

ARGUMENT

I

The Oregon Court Of Appeals Properly Applied The *Edwards* v. *Arizona* Waiver Rule To The Limited Factual Record Of The Present Case. Corporal Hays Improperly Reopened The Criminal Investigation By Taking Unfair Advantage Of Bradshaw's Limited Procedural Remark.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1[illegible], this Court reconciled *Miranda's per se* bar against police questioning of an accused who has invoked the right to counsel with the seemingly divergent rule permitting waiver of the right and the resumption of questioning under limited circumstances. Recognizing that different procedures and stronger "critical safeguards" are involved when an accused asks for counsel as compared with a request to remain silent, this Court clarified

the concrete constitutional guidelines of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), sharply distinguished the right to silence rules of *Michigan* v. *Mosley*, 423 U.S. 96 (1975), and promulgated the qualified *per se* rule governing waiver of an invoked right to counsel. The opinion provided:

> "* * * [A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation [citation omitted], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights [footnote omitted]. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485.

"Initiation" by an accused was limited to remarks that "reopened the dialogue." *Id.*, at 485, n.9. In order to prove the active verb "reopened," the state should be required to prove that the remark indicates an intentional change of mind, an unequivocal willingness to abandon the previously asserted right to counsel, a clear assertion of competence, and a definite willingness to represent oneself in further discussion with the authorities concerning the criminal investigation.

The context of the *Edwards* opinion indicates that "dialogue" is limited to the substantive criminal investigation. The accused "closed" the substantive interrogation by asking for a lawyer. In order to reopen the interrogation, an accused must issue a remark that is relevant to the investigation.

This relevance requirement is based upon precedent and promotes a fair individual-state balance that is central to *Miranda* doctrine. In *Edwards*, Mr. Justice Powell indicated that "routine conversations with suspects about unrelated

matters" do not amount to police initiation. *Id.*, at 490 (Powell, J., concurring). Similarly, an officer's remark that is "normally attendant to arrest and custody" (such as a routine booking question) does not constitute police-initiated interrogation. *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980); *see also United States* v. *Hinckley*, 672 F.2d 115, 122-126 (D.C. Cir. 1982) (opinion defines the limited scope of the booking process).[4] It follows that an arrestee's irrelevant procedural remark does not invite further discussion of the substantive criminal investigation.

Additionally, an arrestee possesses certain statutory as well as state and federal constitutional rights which exist independently alongside the rights to counsel and silence. An individual in custody retains a residuum of personal dignity and privacy that is balanced against the state's legitimate security interest in managing detainees. For example, an arrestee has basic rights concerning food, shelter, medical treatment, speech and religion. In Oregon, an arrestee has a right against unnecessary rigor guaranteed by Article I, section 13 of the Oregon Constitution. *Sterling* v. *Cupp*, 290 Or. 611, 625 P.2d 123 (1981). An arrestee has a general right to call his attorney after his arrest based upon a Fourteenth Amendment liberty interest subject to reasonable restrictions. *State* v. *Newton*, 291 Or. 788, 805-807, 636 P.2d 393, 404-407 (1981). An arrestee's question about these independent rights should not be construed as a waiver of his right to counsel. His request to a jailor for a phone call does not invite further substantive

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[4] *United States* v. *Hinckley*, 672 F.2d 115, 122-123 (1982) indicated:

> "The standard booking process is 'a predominantly clerical procedure, performed immediately or soon after the suspect is delivered to the precinct, or district station'; its primary function is 'record-keeping.' The 25-minute interview with Hinckley [concerning his family and employment "background," involvement with Jody Foster] by FBI and Secret Service agents, conducted five hours after he was taken into custody, bore none of the indicia of a clerical operation."

See also W. LaFave, Arrest 379-380 (1965).

interrogation. Similarly, his remark concerning detention procedures does not invite further interrogation.

By way of illustration, Bradshaw has set forth a comprehensive list of hypothetical remarks that an accused may utter during the arrest and detention process which are irrelevant to the criminal investigation and which do not constitute initiation. *See* the examples in Appendix A. Specific examples of non-initiatory remarks include the following:

A. Well, what is going to happen to me now?

B. When may I call my lawyer?

C. When will a lawyer be appointed?

D. When will the lawyer see me?

E. When may I make a phone call?

F. May I call my grandmother?

G. May I reschedule my appointments?

H. Where are you taking me?

I. How far away is the jail?

J. Will I be able to see a doctor concerning my injured head?

K. May I be released on my own recognizance or admitted to security release?

In light of the above premises, in consideration of the examples of non-initiatory remarks, and based upon a fair interpretation of *Edwards*, this Court should define the concept of initiation by an accused as follows:

> "Initiation" is a statement by an accused that clearly indicates an intentional abandonment of the right to counsel, an assertion of competence, and a definite willingness to represent himself in discussions with authorities concerning the substantive criminal investigation.

When reviewed in this context, Bradshaw's question, "Well, what is going to happen to me now?" reflects the normal concern of an arrestee about his independent rights. Bradshaw had previously told Corporal Hays he and his grandmother,

Irma Stockdale, planned to go to St. Helens that evening and he had a couple of other things to do. Apparently, he wanted to know the procedures "normally attendant to arrest and custody" in order to contact his grandmother and reschedule his appointments. Alternatively, his question was an inartful request concerning the necessary procedures to contact an attorney and to be released on bail. Such a request would amount to a reaffirmation of the right, and not a step towards waiver.

Corporal Hays understood the limited nature of Bradshaw's remark. While still in the Rockaway police station, Hays completed the exchange by telling Bradshaw "where he was going and what he would be charged with" (J.A. 17; Tr. 23). Additional remarks were unnecessary.

It is noteworthy that Hays arrested Bradshaw for furnishing liquor to a minor, but took the opportunity to interrogate him about vehicular homicide. Bradshaw invoked the right to counsel concerning the criminal investigation. He asked a limited question concerning procedural aspects of detention on the alcohol charge. Hays answered the question in a limited fashion. Hays, who had partially reminded Bradshaw of his *Miranda* rights, placed him in the front seat of the patrol car in order to reinterrogate him concerning the vehicular homicide. After Corporal Hays started the car and began driving to the Tillamook County Jail, he resumed questioning by again confronting Bradshaw about his theory of the homicide case.

On this record, the Oregon Court of Appeals concluded that Corporal Hays—not Bradshaw—initiated further dialogue on the substantive criminal investigation. The court reasoned:

> "We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to begin taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant about his culpability and suggest the lie detector test, which was administered the next day.

"The administration of the lie detector test and the subsequent interrogation of defendant were not at his suggestion or request, but were at the instance of authorities. The *Edwards* court emphasized that

> 'it is inconsistent with *Miranda* and its progeny for authorities, *at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.' (Emphasis supplied.) [451 U.S. at 485].

"Thus, under the reasoning enunciated in *Edwards*, defendant did not make a valid waiver of his Fifth Amendment rights, and his statements were inadmissible." *State* v. *Bradshaw*, 54 Or. App. 949, 953, 636 P.2d 1011, 1013 (1982).

Bradshaw bvelieves the Court of Appeals properly interpreted the *Edwards* rule, and its decision should be affirmed.

II

The Determination Of Whether An Accused Has Waived His Fifth Amendment Right To Counsel Should Be Based Upon The *Per Se* Rule Of *Edwards* v. *Arizona*.

In the state's first argument, it urges the Court "to reexamine *Edwards* in light of the basic premises of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), traditional concepts of waiver of constitutional rights and the inherent faults in a *per se* rule." Petitioner's Brief at 14. According to the state, the *Edwards* majority improperly attributed greater significance to an arrestee's request for the assistance of counsel than to a simple request to remain silent. In essence, the state has suggested:

(1) The express language in *Miranda*—when an accused requests counsel "the interrogation must cease until an attorney is present"—does not constitute a *per se* proscription on further questioning;

(2) *Miranda's* prohibition against post-invocation contact and questioning would be furthered by permitting the police to confront defendant with new evidence, new charges, or "new information . . . which caused the defendant to be nonconversant in the first place." Petitioner's Brief at 31-32;

(3) The police should be permitted to immediately resume post-invocation questioning subject to review based upon the totality of the circumstances;

(4) The police should be able to take advantage of any irrelevant comment by defendant as an opportunity to reopen interrogation on the substantive criminal investigation; and

(5) The Court should disregard the added protections accorded by *Miranda's* extension of the right to counsel to Fifth Amendment cases, and, instead, analyze an arrestee's request for a lawyer as something less than an assertion of the "paramount right" to cut off questioning and to remain silent. Petitioner's Brief at 24.

The state claims that initiation is difficult to define and apply, while demonstrating that lower courts have found the "bright line" concept easy to apply. *See* cases cited in Pettitioner's Brief at 38-41, including n.13. Finally, the state suggests review of waiver under the "totality-of-circumstances" with initiation being an important fact.

The state's argument should be rejected as an exaggerated misinterpretation of the *Miranda* doctrine. This Court should reaffirm the "bright line" waiver standard announced in *Edwards* based upon the following reasons:

A. The *Edwards* rule perfectly reconciled *Miranda's* seemingly divergent rules on the cessation of questioning and the resumption of questioning in right to counsel cases.

B. The "defendant-initiated waiver" requirement is a necessary procedural safeguard to protect the right to counsel after its assertion but before counsel arrives.

C. The *Edwards* rule is clear and easy to administer.

A. The *Edwards* Rule Perfectly reconciled *Miranda's* Seemingly Divergent Rules On the Cessation Of Questioning And The Resumption Of Questioning In Right To Counsel Cases.

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court extended the greater protections inherent in the Sixth Amend-

ment right to counsel to Fifth Amendment custodial encounters. To dispel the subtle compulsion inherent in custodial interrogation, the Court established "critical safeguards" attached to the right and promulgated concrete constitutional guidelines which must be followed in order to honor the exercise of the right.

When Bradshaw requested counsel, he triggered "his right to be free of contact with the authorities in the absence of an attorney" and "his right to be free of interrogation about the crime of which he was suspected." *Wyrick* v. *Fields*, ___ U.S. ___, 51 U.S.L.W. 3411-3412, (No. 82-158, November 29, 1982). In *Miranda*, the Court empahsized the "right to consult with counsel" combined with "the presence of counsel" was the necessary "protective device" to safeguard the exercise of the right. 384 U.S. at 4656, 470. The opinion provided:

> "[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.*, at 470.

When Bradshaw invoked the right, he activated *Miranda's per se* rule mandating the cessation of all questioning which provides:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 474.

This Court has repeatedly acknowledged this *per se* proscription. *See Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981); *Rhode Island* v. *Innis*, 446 U.S. 291, 298 (1980); *Fare* v. *Michael C.*, 442 U.S. 707, 719-723 (1979); *Michigan* v. *Mosley*, 423 U.S. 96, 104, n.10 (1975); *Id.*, at 109-111 (White, J., concurring). Bradshaw interprets its reach as banning all questioning, prompting or other forms of subtle compulsion that are

reasonably likely to cause an arrestee to incriminate himself or to waive his right before "consultation and presence" of counsel.

In *Miranda*, the possibility of waiver is posited opposite the *per se* bar on questioning. The opinion provided:

> "If the [post-invocation] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

The Court's opinion went on to say:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was eventually obtained." *Id.*

At first glance, these two doctrines appear seemingly divergent. Upon closer inspection, they are logically reconcilable. Under *Miranda*, only defendant-initiated waivers are permissible. Because all questioning and prompting must cease unless there is the consultation with and presence of counsel, the defendant-initiation requirement is a *necessary* part of the critical safeguard. This is especially true in the early stages of arrest and transport where the bar on contact must be compromised based upon administrative necessity. Thus, in order to absolutely honor the exercise of the right, the police may not reopen the investigation dialogue.

This interpretation does not eliminate defendant-initiated waivers. A spontaneously volunteered statement is admissible. Likewise, when defendant reopens the investigation and manifests a knowing, intelligent and voluntary waiver, his subsequent volunteered statements and responses to interrogation are admissible. The initiation requirement removes the taint of post-invocation police compulsion prohibited by *Miranda*. The requirement assures a fair individual-state

balance and assures that defendant "reopened the dialogue" based upon a clear change of mind free of compulsion.

In announcing the qualified *per se* rule governing waiver, this Court in *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981), clarified and reconciled the above-mentioned *Miranda* doctrines. The opinion represents a reasonable and faithful interpretation of *Miranda*. It should be affirmed.

It is noteworthy that the opinion clarified the confusion among the lower courts. Before *Edwards*, the lower courts adopted three positions concerning waiver of the right to counsel. Each position reflects a differnt pattern of emphasis between *Miranda's per se* bar on questioning and its limited waiver rules.

The first approach adopted a strict *per se* prohibition on police reinterrogation even where defendant initiated further conversation. *See United States* v. *Massey*, 550 F.2d 300, 307-308 (5th Cir. 1977)(request for counsel postpones interrogation until counsel is present); *United States* v. *Priest*, 409 F.2d 491, 493 (5th Cir. 1969)(no questioning permitting after request for counsel).[5]

The second approach adopted the qualified *per se* rule allowing defendant-initiated waivers, but adopted a flat prohibition

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[5] Other cases applying a flat prohibition on post-invocation questioning under all circumstances include:

Moore v. *State*, 261 Ark. 275, 551 S.W.2d 185 (1977); *Webb* v. *Stone*, 258 Ark. 95, 522 S.W.2d 406 (1975); *People* v. *Brake*, 191 Colo. 390, 553 P.2d 763 (1976); *State* v. *Boone*, 220 Kan. 758, 556 P.2d 864, 873 (1976); *People* v. *Cook*, 78 Ill. App. 3d 695, 397 N.E.2d 439 (1979); *Stevens* v. *State*, 265 Ind. 396, 354 N.E.2d 727 (1976); *Murphy* v. *State*, 336 So.2d 213 (Miss. 1976), *cert. denied*, 429 U.S. 1076 (1977) (statements are not voluntary when made after a request for attorney which is not honored).

One limited exception applied. When the request for counsel was equivocal, the police were permitted to ask clarifying questions to the extent necessary to clear up any confusion as to the suspect's intentions. *Thompson* v. *Wainwright*, 601 F.2d 768, 771 (5th Cir. 1979).

against resumed questioning, unless the defendant requested it. *See United States* v. *Womack*, 542 F.2d 1047 (9th Cir. 1976); *United States* v. *Clark*, 449 F.2d 802, 807-808 (4th Cir. 1974)(police-initiated interrogation after assertion of right to counsel made subsequent responses to interrogation involuntary); *United States* v. *Blair*, 470 F.2d 331, 338 (5th Cir. 1972) *cert. denied* (1973)(Miranda's prohibition on post-assertion interrogation "could hardly have been more uncompromising"); *People* v. *Petlingill*, 21 Cal. 3d 231, 578 P.2d 108, *cert. deined*, 429 U.S. 847 (1976); *People* v. *Fioritto*, 68 Cal.2d 714, 441 P.2d 625 (1968). This is the approach suggested by the American Law Institute. *See* ALI Model Code of Pre-Arraignment Procedure, § 140.8 (1975) set forth as Appendix B herein.[6]

The third approach allowed renewed interrogation after a request for counsel subject to review based on the totality-of-circumstances. *See, e.g., White* v. *Finkbeiner*, 611 F.2d 186 (7th Cir. 1979), *vacated and remanded*, 451 U.S. 1013 (1981), *on remand*, 687 F.2d 885 (7th Cir. 1982); *United States* v. *Wilson*, 571 F.2d 455 (9th Cir. 1978); *United States* v. *Grant*, 549 F.2d 942 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977).[7]

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[6] Other cases adopting a flat prohibition against resumed questioning, unless the defendant requests it, include *People* v. *Harris*, 191 Colo. 234, 552 P.2d 10 (1976); *People* v. *Salazar*, 189 Colo. 429, 541 P.2d 676 (1975) (defendant must affirmatively withdraw a request for counsel); *People* v. *Medina*, 37 Ill. App. 3d 1029, 347 N.E.2d 424 (1976); *Commonwealth* v. *Mercier*, 451 Pa. 221, 302 A.2d 337 (1973); *State* v. *Marcum*, 24 Wash. App. 441, 601 P.2d 975 (1979) (all questioning must stop but defendant may initiate waiver); *see generally*, Comment, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. Chi. L. Rev. 413, 437-441 (1969).

[7] *See also United States* v. *Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), *cert. denied* 436 U.S. 919 (1978); *Cobbs* v. *Robinson*, 528 F.2d 1331 (2d Cir. 1975), *cert. denied* 424 U.S. 947 (1976); *but see Nash* v. *Estelle*, 597 F.2d 513 (5th Cir.), *cert. denied* 444 U.S. 981 (1979).

The first approach placed strong emphasis on the prohibition of interrogation without accomodating the waiver doctrine. The third approach placed excessive emphasis on the waiver doctrine, while impermissibly weakening the *per se* proscription against questioning. As this Court recognized in *Edwards*, only the second approach reconciled the competing doctrines to provide a fair and reasonable interpretation of *Miranda*.

B. The "Defendant-Initiated Waiver" Requirement Is A Necessary Procedural Safeguard To Protect The Right To Counsel After Assertion But Before Counsel Arrives.

The critical safeguards and constitutional rules attached to the right to counsel offer greater protections than their counterparts in a right to silence case. There, the safeguard is the arrestee's "right to cut off questioning." *Michigan* v. *Mosley*, 423 U.S. 96, 103 (1975). When the arrestee expresses a desire to remain silent, *Miranda* requires "the interrogation must cease." 384 U.S. at 473. *Mosley* requires the authorities to scrupulously honor the exercise of the right. Thus, in most cases, the resumption of interrogation will violate the right.

Bradshaw interprets the *Mosley* exception as being limited to its extremely unusual facts. The opinion does not aid the state, because this case involves a right to counsel issue. Additionally, Corporal Hays' behavior violates *Mosley* as well as *Edwards*, because the factual prerequisites of *Mosley* are absent.[8]

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[8] One commentator has interpreted *Michigan* v. *Mosley*, 423 U.S. 96 (1975) as follows:

"*Mosley* held that when a suspect invokes his right to remain silent (as opposed to his right to counsel), police interrogation may be resumed at least in the following circumstances: (1) the original interrogation is promptly terminated; (2) the questioning is resumed only after 'the passage of a significant period of time'; (3) the suspect is given another set of *Miranda* warnings at the outset of the second interrogation; (4) a different officer resumes the questioning; and (5)

In *Mosley*, Mr. Justice White analyzed the foundation for the dichotomy of rights. When an individual merely invokes the right to silence, he is acknowledging his competence to represent himself in future discussions with the authorities. *Id.*, at 109, n.1 (White, J., concurring). Where the accused proceeds on a *pro se* basis, it is reasonable to keep the lines of communications open in order to advise him that a verifiable alibi would lead to his release or that the case against him is strong and his cooperation in apprehending and convicting others would redound to his benefit in the form of a reduced charge. *Id.* While an accused is accorded the opportunity to negotiate a better deal, this does not authorize repeated rounds of post-invocation interrogation to compel a confession. A fair individual-state balance is maintained.

The opinion contrasts a request for counsel:

> "The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communications between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect therein. The authorities may then communicate with him

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the second interrogation is limited to a crime that has not been the subject of the earlier interrogation.

"Although it has forcefully been argued that the fact that the second questioning session in *Mosley* was restricted to a separate and 'unrelated' crime was 'critical,' see Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 134, circumstances (1)(2) and (3) may suffice to permit the resumption of questioning. Factors (1), (2) and (3) would seem to be *the minimum requirement* for renewed questioning when a suspect indicates that he wishes to remain silent."

Kamisar, "*Edwards* v. *Arizona* in the Lower Courts: Applying a Reinvigorated *Miranda*," in J. Choper, Y. Kamisar & L. Tribe, *The Supreme Court: Trends & Developments 1981-1982*, at ____, n.3 (1983) [hereinafter *Edwards in the Lower Courts*]. *See also Id.*, n.8.

> through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Id.*, at 110, n.2.

In asking for a lawyer, the arrestee has uttered a "cry for help." He has acknowledged his position of weakness and his incompetence to make his own decisions. Even a "street-wise" arrestee has acknowledged he needs a lawyer to properly represent his interests. By invoking the right, he has already exercised the option of self-determination by deciding he needs consultation with and the presence of a lawyer in further discussions with the authorities about the alleged crime. Any necessity for keeping open lines of communication may be fulfilled in this situation by contacting the suspect's attorney, and further questioning of the defendant is never required.

An attorney can ascertain the nature of the charges and the strength of the state's case. After privileged discussions with the client concerning the extent of his involvement, the attorney would have the requisite informational basis upon which to recommend cooperation, discussion of an alibi, negotiations, or trial.

This Court recently emphasized the fundamental importance of counsel in safeguarding the exercise of the right. Mr. Justice Blackmun writing for the majority in *Fare* v. *Michael C.*, 442 U.S. 707 (1979) noted:

> "The rule in Miranda, however, was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client becomes enmeshed in the adversary process, the Court found that 'the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system's established by the Court. Id., at 469. Moreover, the lawyer's presence helps guard against overreaching by the police and ensures that any statements actually

obtained are accurately transcribed for presentation into evidence. Id., at 470.

> "The per se aspect of Miranda was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accussed, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in Miranda the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." 442 U.S. at 719.

As discussed above, the *Edwards* procedural testimony for the two rights is reasonable and consistent with *Miranda*. In the right to counsel context, Bradshaw believes consultation between lawyer and client is a necessary prerequisite to restore a fair individual-state balance. Only the lawyer can dispel the compulsion inherent in custodial questioning of the accused. An officer's prompting or other forms of subtle compulsion certainly worsens the individual-state balance from the defendant's point-of-view. For this reason, the defendant-initiation requirement is a necessary part of the right to counsel protections.

C. The *Edwards* Rule Is Clear And Easy To Administer.

In addition to its inherent fairness, the *Edwards* rule is clear and easy to administer. This Court has readily applied it to a variety of fact situations:

This Court has consistently applied the *Edwards* standard. *See Wyrick* v. *Fields, supra; Williams* v. *Ohio*, 452 U.S. 935 (1981); *Blakney* v. *Montana*, 451 U.S. 1013 (1981); *White* v. *Finkbeiner*, 451 U.S. 1013 (1980); *Leuschner* v. *Maryland*, 451 U.S. 1014 (1981); *Monroe* v. *Idaho*, 451 U.S. 1014 (1981); *Wantland* v. *Maryland*, 451 U.S. 1014 (1981) and *James* v. *Illinois*, 451 U.S. 1014 (1981). In *Wyrick*, defendant's request to submit to interrogation in the form of a polygraph examination was clearly a defendant-initiated waiver. In the remaining cases, law enforcement officers improperly initiated interrogation after defendants had requested the right to counsel.

The judgments were vacated and the cases remanded in light of *Edwards*. These cases demonstrate the simplicity of application and the guiding power of *stare decisis* in generating meaningful precedents.

The lower courts have had no trouble in distinguishing between improper police-initiated interrogation, *United States* v. *Hinckley*, 672 F.2d 115 (D.C. Cir. 1982); *United States* v. *Downing*, 655 F.2d 404 (1st Cir. 1981); *Stumes* v. *Solem*, 671 F.2d 1150 (8th Cir. 1982); and defendant-initiated waivers, *United States* v. *Gordon*, 665 F.2d 478 (2d Cir. 1981); *United States* v. *Thierman*, 678 F.2d 1331 (9th Cir. 1982).

Similarly, the state courts have had no post *Edwards* trouble in applying the "initiation" standard. Examples of cases where the courts have found improper police-initiated interrogation after defendant asserted the right to counsel include: *State* v. *Brannam*, 275 Ark. 16, 627 S.W.2d 8 (1982) (repeated rounds of questioning); *Scroggins* v. *State*, 633 S.W.2d 33, 37 (Ark. 1982); *People* v. *Cerezo*, 635 P.2d 192 (Colo. 1981) (intentional police initiation and taking advantage of defendant's inquiry of "How things looked for her"); *Silling* v. *State*, 414 So.2d 1182 (Fla. App. 1982) (officer asked, "Why she did it?"), *Wilson* v. *Zant*, 290 S.E.2d 442, 446 (Ga. 1982); *Vaughn* v. *State*, 281 S.E.2d 594, 597 (Ga. 1981); *State* v. *West*, 408 So.2d 1114 (La. 1982) (officer threatened to arrest defendant's mother and offered a deal if defendant gave a statement); *State* v. *McCloskey*, 90 N.J. 18, 446 A.2d 1201 (1982); *State* v. *Taylor*, 56 Or. App. 703, 643 P.2d 379 (1981) (officer-initiated interrogation); *State* v. *Fitzgerald*, 60 Or. App. 466, ___ P.2d ___ (1982); *Goodnough* v. *State*, 627 S.W.2d 841 (Texas Cr. App. 1982) (prompting); *Casillo* v. *State*, 616 S.W.2d 620, 623 (Texas Cr. App. 1981) (officer confronted defendant with new evidence).

State courts readily found defendant-initiated waivers. Examples include: *State* v. *Piatt*, 132 Ariz. 145, 644 P.2d 881 (1982) (defendant asked Tucson detectives to "call him"); *Coble* v. *State*, 274 Ark. 134, 624 S.W.2d 421, 424 (1981); *Richardson* v. *State*, 274 Ark. 473, 625 S.W.2d 504, 506 (1981); *Jennings* v. *State*, 413 SO.2d 24 (Fla. 1982); *Barksdale* v. *State*, 161 Ga.

155, 291 S.E.2d 18 (1982) (defendant repeatedly initiated discussions with sheriff); *Caffo* v. *State*, 247 Ga. 751, 279 S.E.2d 678, 682, n.1 (1981) (defendant requested that the interview begin again); *State* v. *Dowles*, 56 N.C. App. 578, 289 S.E.2d 883 (1982) (defendant) indicated willingness to answer selective questions).

The primary reason why the *Edwards* test works so well is that the lower courts have interpreted it as establishing a *per se* rule.[9] Under the rule, the state must clearly establish two threshold facts, i.e., (1) the police refrained from post-invocation interrogation in the absence of counsel, and (2) defendant reopened the dialogue. Thereafter, it must establish by clear and convincing evidence that an arrestee made a knowing, intelligent and voluntary waiver. *Edwards* v. *Arizona*, *supra*, 451 U.S. at 482-483.

The Court should specifically reaffirm the *Edwards per se* rule in order to fairly interpret *Miranda's* basic premises, to safeguard the important right to counsel, to provide a "bright line" to guide lower courts and generate meaningful precedent, and to clearly limit police conduct.[10]

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[9] Most commentators have also interpreted *Edwards* as establishing a *per se* rule. *See* Kamisar, *Edwards* v. *Arizona in the Lower Courts;* Comment, *Edwards* v. *Arizona: The Burger Court Breathes New Life Into Miranda*, 69 Cal. L. Rev. 1734 (1981); Comment, *Fifth Amendment—Waiver of Previously Invoked Right to Counsel*, 72 Jour. of Crim. Law & Criminology 1288 (1981); Comment, *Criminal Procedure—Self-Incrimination: Miranda Lives*, 33 U. Fla. L. Rev. 788 (1981).

[10] In the absence of such blanket prohibition on certain categories of police behavior, studies indicate law enforcement officials have tended to "push to the limit" any constitutional restraint on their actions. For example, despite having to give *Miranda* warnings, police are still able through a variety of techniques to induce the overwhelming majority of suspects to waive the right to counsel. After an arrestee requests counsel, the use of interrogation tactics

III

This Court Should Further Clarify And Strengthen The *Edwards* Waiver Rule.

In Petitioner's Brief, the state suggests "initiation is difficult to define, and its application will chill all custodial communication." Petitioner's Brief at 28-32. The state's concern are chimerical.

As indicated above, in Arguments I and II-1A, this Court and the lower courts have found "initiation" easy to define and apply. The "bright line" objective standard works well in both theory and practice. On the second point, initiation is not overbroad. It serves *Miranda's* laudatory purpose of forbidding authorities from reopening the substantive investigation through prompting, interrogation, and other forms of subtle compulsion that are reasonably likely to cause the arrestee to

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leads to impermissible waiver. Thus, restraint on police-initiated contacts is necessary to further *Miranda's per se* proscription.

See White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 598 (1979); Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 Den. L. J. 1, 26-34 (1979); *Oregon State Police Manual* 101-103 (1979); Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements*, 39 Tenn. L. Rev. 407 (1972); Medalie, Zeitz and Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 Mich. L. Rev. 1347, 1394-95 (1968); Inbau & Reid, *Criminal Interrogation and Confessions*, 31, 106 (2d ed. 1967); Project, *Interrogation in New Haven: The Impact of Miranda*, 76 Yale L. J. 1519, 1614 (1967); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. Pitt. L. Rev. 1 (1967); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 94-104 (1966); Lynch, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 221 (1966); Younger, *Interrogation of Criminal Defendants—Some Views on Miranda* v. *Arizona*, 35 Fordham L. Rev. 255 (1966); Aubrey and Caputo, *Criminal Interrogation* (1st ed. 1965).

waive the right or incriminate himself. Both the defendant and the officer may discuss matters normally attendant to arrest and detention without reopening the investigation. Only potentially incriminatory police pressure is forbidden. In this respect, *Edwards* strikes a fair balance.

In practice, the vast majority of cases will be clear. It should be relatively simple to determine whether defendant reopened the investigatory dialogue or whether he commented upon an irrelevant matter. In the few cases where the remark was vague, the remark should be deemed non-initiatory. This construction is consistent with the heavy burden placed upon the state to prove a clear waiver.

This case presents an opportunity for the Court to clarify and strengthen the *Edwards* waiver rule. Bradshaw believes the following proposed rules would further safeguard the invoked right to counsel and clearly limit police behavior in a manner consistent with the Miranda doctrine.

A. In general, the police officer should refrain from all irrelevant remarks during arrest, transportation, booking and detention, where an arrestee has invoked the right to counsel.

B. The officer should refrain from all interrogation, prompting or other forms of subtle compulsion reasonably likely to cause an arrestee to incriminate himself or to waive the right.

C. The officer may only initiate statements that are necessarily attendant to arrest and detention procedures.

   1. The statement must be:

      a. Necessarily attendant to arrest and detention procedures;

      b. Nondeferrable until defendant has had an opportunity to consult with and contact an attorney;

      c. Normally directed at an arrestee rather than his attorney (e.g., statements involving fingerprinting, strip search, etc.); and

d. Limited to minimum breadth necessary to convey or ascertain the essential information.

2. The statement must not be:

a. Reasonably likely to incriminate or to induce waiver of the right to counsel; or

b. A subterfuge to promote further interrogation or waiver.

D. If defendant makes a statement concerning an irrelevant matter or involving his independent statutory or constitutional rights, the officer should limit his remarks as follows:

1. The officer should only respond to a question that requires an immediate response.

2. The response should be

a. Limited in accordance with the principles in rules A, B and C; and

b. Limited to the narrow subject matter of the question.

3. Where a response would be reasonably likely to cause defendant to waive his right, or incriminate himself, the officer should not directly respond. Instead, he should advise the arrestee:

"I cannot respond to that remark. You should discuss the matter with your attorney."

4. The officer should not discuss anything relevant to the criminal investigation in the absence of counsel.

E. If an arrestee clearly expresses a desire to reopen the substantive criminal investigation, the officer should not interrogate the person until the following steps have occurred.

1. The officer readvised the arrestee of his complete *Miranda* warnings;

2. The officer asked these clarifying questions:

a. "Do you fully understand these rights?"

b. "Do you now wish to abandon your right to consult with an attorney and to have him pre-

sent during further questioning about your charge(s)?"

c. "Do you expressly and voluntarily waive the right to counsel during further questioning about your charge(s)?"

d. "Do you wish to proceed on your own behalf?"

e. "Are you now willing to answer further questions about the charge(s)?"

3. After an arrestee has affirmatively answered the above questions, the officer may resume the interrogation.

IV

The "Totality Of Circumstances" Test—A Pretext Arrest And Unexplained Delay In Arraignment.

It will be assumed for the sake of argument that Bradshaw's remark, "Well, what is going to happen to me now?" is the triggering mechanism to shift the analysis from the "*per se*" rule to the "totality of circumstances" test. It will be seen that the Attorney General's criticism and suggested abandonment of this Court's rationale in *Edwards* supporting the *per se* rule when the right to counsel is invoked and requiring viewing a government claim of waiver with "skepticism," is clearly unfounded (Petitioner's Brief at 25-26).

Oregon's Attorney General correctly puts Officer Hays' good faith in issue[11] under the "totality of circumstances" test in an attempt to distinguish the "extremely suspect police procedures" in *Edwards* v. *Arizona*, 451 U.S. 477 (1981).[12] Officer

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[11] "In examinining the totality of the circumstances in a case of post-invocation waiver, the origin of the renewed conversation is a highly relevant factor. In some cases of heavy-handed police misconduct, it may very well be the determining factor and thus would require suppression of a subsequent confession." (Petitioner's Brief at 33-34).

[12] "Arrested on murder, burglary, and robbery charges, Edwards was advised of his *Miranda* rights and, after some initial questioning, requested counsel. The police then ceased the interrogation. When

Hays' conduct is also important because the threshold question of who ultimately initiated the agreement for Bradshaw to take the polygraph examination[13] through another police officer hinges on Officer Hays' less than articulate recollection of the purported unrecorded "conversation" between Officer Hays and Bradshaw shortly after his arrest and request for counsel.

Sometime after 9 p.m. on Sunday, September 14, 1980, Bradshaw was arrested for furnishing alcohol to a minor and "lodged in the Tillamook County Jail in lieu of $10,300 bail" (Ex.11, Information Report, Officer Hays, dated 9-17-80, p.4). Defendant confessed "late" the following morning after being given the results of the polygraph test (J.A. 30; Tr. 42). At 1:30 p.m., he was arraigned before the Tillamook Justice of the

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two detectives asked to see defendant the next morning, he told a guard he did not wish to speak to anyone. The guard replied defendant 'had to' talk to the detectives. The police then readvised defendant of his *Miranda* rights, and he ultimately gave an incriminating statement." (Petitioner's Brief at 21).

[13] The use of a polygraph examination does not *per se* create any impropriety in inducing Bradshaw's confession. This is so even though the results of a polygraph test are generally inadmissible because it "has not yet attained general scientific acceptance as a reliable and accurate means of ascertaining truth of deception * * *", *State* v. *Green*, 271 Or. 153, 166, 531 P.2d 245 (1975), citing with approval Reid and Inbau, *Truth and Deception: The Polygraph ("Lie-Detector") Technique* 254 (1966). But a defendant fully advised of his constitutional rights after being told that his polygraph test results showed "deceptive patterns" may or may not be compelled by mental coercion. *State* v. *Clifton*, 271 Or. 177, 531 P.2d 256 (1975); *State* v. *Green*, *supra*; *State* v. *Keiper*, 8 Or. App. 354, 493 P.2d 750 (1972).

The actual polygraph results are not a part of the record. However, based on the police assumption that Bradshaw was lying about the events surrounding Reynolds' death, what would Officer Rainey have told Bradshaw about the results had he passed the test? In any event, the use of an unreliable device to extract a confession should carry great weight on the totality scale negating a finding of waiver.

Peace on the charge of furnishing liquor to a minor with bail set at $10,300 (Ex.11, Custody Report, Officer Hays, dated 9-15-80, p.1).

That afternoon, the Tillamook County District Attorney directed the police to charge Bradshaw with manslaughter, felony driving while revoked and driving under the influence (Ex.11, Police Information Reports, Officer Hays, dated 9-17-80, p. 1-2; Officer Stephenson, dated 9-16-80, p.2). Bradshaw was then arraigned on the more serious charges, arising from his confession at 7 p.m. (Ex.11, Police Information Reports, Officer Nicholson, dated 9-17-80, p.1). Bail was increased to $25,300 (Ex.11, Police Information Report, Officer Stephenson, dated 9-16-80, p.1).

The record is silent as to why Bradshaw was not arraigned earlier Monday morning at the Tillamook County Courthouse where the polygraph was later given.

The record discloses that Officer Hays made a pretext arrest of Bradshaw for furnishing alcohol to a minor[14] which was illegal and void from its inception under Oregon law. The

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[14] Oregon Revised Statutes 471.410(2), (3)(a):

"(2) No person other than his parent or guardian shall sell, give or otherwise make available any alcoholic liquor to any person under the age of 21 years. A person violates this subsection if he sells, gives or otherwise makes available alcoholic liquor to a person with the knowledge that the person will violate this subsection.

"(3) Upon violation of subsection (2) of this section, the court shall impose a mandatory minimum sentence as follows:

"(a) Upon a first conviction for the offense, a fine of $200."

charge of furnishing alcohol to a minor is an unclassified violation[15] carrying a maximum penalty of a $250 fine.[16]

Officer Hays' statutory authority to arrest Bradshaw without a warrant was limited under ORS 133.310(1)(a), (b) as follows:

> "(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed:
>
> "(a) A felony, a Class A misdemeanor[17] or an unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty

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[15] Oregon Revised Statutes 161.565:

"An offense is a violation if it is so designated in the statute defining the offense or if the offense is punishable only by a fine, forfeiture, fine and forfeiture or other civil penalty. Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

Oregon Revised Statutes 161.575:

"(1) Any violation defined in the Oregon Criminal Code is expressly designated in the section defining the offense. Any offense defined outside this code which is punishable as provided in ORS 161.565 shall be considered a violation.

"(2) Violations are not classified."

[16] Oregon Revised Statutes 161.635(3):

"(3) A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding $250."

[17] Oregon Revised Statutes 161.615(1):

"Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following limitations:

"(1) For a Class A misdemeanor, 1 year."

allowed for a Class A misdemeanor, or a major traffic offense as defined in ORS 484.010(5);[18] or

"(b) Any other offense *in the officer's presence* . . ."

The charge of furnishing alcohol to a minor did not qualify as a violation for which defendant could be arrested without a

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[18] Oregon Revised Statutes 484.010(5):

"(5) 'Major traffic offense' means a violation of any of the following provisions of law or a city ordinance conforming thereto:

"(a) Reckless driving as defined in ORS 487.550.

"(b) Driving while under the influence of intoxicants, as defined in ORS 487.540.

"(c) Failure to perform the duties of a driver involved in an accident or collision, as defined in ORS 483.602 (1) and (2) and 483.604.

"(d) Driving while suspended or revoked, as defined in ORS 487.560.

"(e) Fleeing or attempting to elude a police officer, as defined in ORS 487.555.

"(f) Driving after being declared to be a habitual offender, as set forth in ORS 484.740."

Oregon Revised Statutes 487.550(2):

"(2) Reckless driving is a Class A misdemeanor."

Oregion Revised Statutes 487.540(2):

"(2) Driving while under the influence of intoxicants is a Class A misdemeanor."

Oregon Revised Statutes 487.560(5), (6):

"(5) Except as provided in subsection (6) of this section, driving while suspended or revoked is a Class A misdemeanor.

"(6) Driving while suspended or revoked is a Class C felony if the suspension or revocation was the result of a finding that the person is an habitual traffic offender under ORS 484.730 or of a conviction for any of the following offenses:

"(a) Any degree of murder, manslaughter, criminally negligent homicide or assault resulting from the operation of a motor vehicle.

warrant. This leaves all of the factual circumstances relied on by the Attorney General to show initiation, waiver and the actual confession in an atmosphere of unlawful detention.[19]

"(b) Any crime punishable as a felony with proof of a material element involving the operation of a motor vehicle.

"(c) Failure to perform the duties of a driver involved in an accident or collision which results in physical injury or death to any person.

"(d) Reckless driving.

"(e) Fleeing or attempting to elude a police officer.

"(f) Driving while under the influence of intoxicants."

Oregon Revised Statutes 487.555(4):

"(4) Fleeing or attempting to elude a police officer is a Class A Misdemeanor."

Oregon Revised Statutes 487.740:

"Except as provided in ORS 484.735(2), it shall be unlawful for any person to operate a motor vehicle in this state while the order of the court prohibiting such operation remains in effect. A person who violates this section commits a Class C felony."

[19] Trial defense counsel at no time presented a direct claim that obtaining Bradshaw's confession, a fruit of an illegal arrest, violated Oregon's arrest statutes or any constitutional provision, state or federal. *See Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Taylor* v. *Alabama*, 454 U.S. 903 (1982); *Dunaway* v. *New York*, 442 U.S. 200 (1979); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Nardone* v. *United States*, 308 U.S. 338 (1939); *State* v. *Lloyd*, 22 Or. App. 254, 538 P.2d 1278 (1975). For this reason and the fact that the issue at the appellate court level has always been addressed as a "*per se*" problem under *Edwards*, the assertion was not separately assigned as error in Oregon's appellate courts.

Defendant does not contend that a violation of Oregon's arrest statutes necessarily abridges Fourth Amendment and Due Process standards. *See Street* v. *Surdyka*, 492 F.2d 368 (4th Cir. 1974). But the Attorney General has opened the door in his quest for an analysis of this case under the "totality of the circumstances" test. The invasion of Bradshaw's personal liberty including the indignity of Offic-

It might be argued by the state to rebut this claim, that there are no facts in the record to show Officer Hays did not in good faith believe he had the authority to arrest Bradshaw for furnishing alcohol to a minor.[20]

In Officer Hays' Special Report[21] describing the discussions of 5:45 p.m., Sunday, September 14, 1980, with Bradshaw at Reynolds' cabin and prior to taking Bradshaw to the police station, Officer Hays wrote: "Bradshaw wanted to know if he would be in trouble for furnishing liquor to a minor since he had bought a fifth and a pint of Black Velvet whiskey which he had given Renolds to drink."

It is clear at this point Officer Hays had probable cause to cite Bradshaw on the charge of furnishing. Bradshaw's statements were corroborated by the empty bottles discovered in Reynolds' cabin and by the blood alcohol content of Reynolds' blood.

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er Hays' warrantless arrest, handcuffing, probable fingerprinting, photographing, search and imprisonment in jail clothes without bail or with excessive bail dispels any notion of a valid waiver.

[20] Officer Hays' good intent is initially refuted in that Hays had the authority to issue a citation in lieu of arrest which any reasonable officer would have done on a violation that carried a maximum penalty of a $250 fine.

Oregon Revised Statutes 133.055:

"(1) A peace officer in lieu of taking the person into custody may issue and serve a citation to the person to appear at the court of the magistrate before whom the person would be taken pursuant to ORS 133.450."

Oregon Revised Statutes 133.045(1):

"ORS 133.055 shall apply in any instance when a person is subject to arrest on a misdemeanor or violation charge or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed and:

"(1) The arrest is made without a warrant pursuant to ORS 133.310; or * * * ."

[21] Ex.11, dated 9-17-80.

Instead of arresting Bradshaw, Officer Hays emphasized that Bradshaw was not in custody but had voluntarily come to the police station. Officer Hays even advised Bradshaw of his *Miranda* rights (J.A. 10-11; Tr. 16-17).

Officer Hays was then given eight additional opportunities to arrest Bradshaw for furnishing at the police station:

> "A. [BRADSHAW]: I contacted him at, let's see, he got off work at 5:00. I caught him coming home at 5:30, and I asked him if he wouldn't like to drink a little bit of whiskey.
>
> "[HAYS]: Okay.
>
> "* * * * *.
>
> "A. You know. And, so I walked up the liquor store, and I picked up a pint and a fifth of whiskey, Black Velvet . . . .
>
> "Q. Uh huh.
>
> "* * * * *.
>
> "A. And then after she came home, well me and Lowell went over, and we was drinking some whiskey.
>
> "* * * * *.
>
> "A. And, anyway we was, we was over there and we was drinking whiskey and everything. He went down to the phone booth to call his girl friend, but, I presume it was his girl friend that was there.
>
> "* * * * *.
>
> "A. You know. And he came back up, and we was setting there and we was listening to some rock and roll music and looking at TV at the same time and drinking whiskey.
>
> "Q. Uh huh.
>
> "* * * * *.
>
> "Q. During the period of time that uh, these two girls and these two guys were there, do you recall what, what happened when all, when all six of you were there. You

had two guys, two girls, you, and Lowell. Were you just drinking whiskey or . . .

"* * * * *.

"Q. Sure. Now, do you uh, remember some beer that was there, uh, you said that was drank last night, where did this beer come from?

"A. The Olympia beer that was there? I went down to the store . . .

"Q. There was a Schlitz and there was an Oly.

"A. There was a Schlitz?

"Q. Yeah. Schlitz bottle sitting on . . .

"A. I don't know where the Schlitz come from, because I drink Olympia myself.

"Q. Uh huh. Did you buy . . .

"A. And . . .

"Q. Buy some . . .

"A. Yes. I went down to the store earlier that day, around 4:00 or 4:15, and I picked up a six-pack of Olympia. And I was sitting there drinking it, and then when Lowell got off work, I asked him if he wouldn't like a beer, and he goes, 'Yeah,' and we got sitting over there and got talking about whiskey . . .

"Q. Uh huh.

"A. And stuff, and I asked him if he felt like drinking a little bit of whiskey, and he said yes. So that's when I went down to the liquor store and bought a fifth and a pint.

"Q. Uh huh.

"A. (inaudible)

"Q. Do you know how old Lowell is?

"A. I think that, I'm not really for sure, but I think he said he was only 20 years old.

"Q. Yeah. That's how old he is.

"A. You know, and that's the reason why I asked the officer there that, if there'd be any charges brought against me, you know, for buying a minor alcohol.

"Q. This is possible.

"A. (inaudible)

"Q. It's very possible.

"A. If it is, I'm willing to face the, you know.

"Q. Okay. Well, we'll work with that later, all right?

"A. I mean because . . .

"Q. The thing is we want to determine exactly what happened last night. So, in going over your mind, as best you can remember, the people that were in the apartment at the time you got hit on the head was Lowell . . .

"A. Uh huh.

"Q. A girl named Julie or Julia, something like that . . .

"A. Judy or Julie.

"Q. Judy, another girl who you thought's name was Kim . . .

"* * * * *.

"Q. Uh huh. Okay. Is there anything else that happened this evening that uh, or happened yesterday evening that you happened to think about?

"A. Nothing that I know of, only that me and Lowell was partying last night, you know.

"A. Uh huh. Partying pretty heavy, huh?

"A. Well, not, not what . . .

"Q. Well . . .

"A. You really call heavy . . .

"Q. (inaudible) well, a fifth and a . . .

"A. We was setting around.

"Q. Pint of Black Velvet and some beer would be . . .

"A. Yeah.

"Q. To me would be pretty heavy.

"A. Well, yeah.

"Q. Maybe not to you, but to me.

"A. I guess it would be, really, you know . . .

"Q. Between the two of you.

"A. But other than that . . . ."

(J.A. 48-65; Ex. 2, at 3-19)

Officer Hays' interrogation can be characterized as remarkably friendly. He carefully recorded Bradshaw's suspected inconsistencies about the assault which was already rebutted by other witnesses who had been contacted (J.A. 53-55; Ex. 2, at 8-10). The officer also established that Bradshaw could not legally drive an automobile on Oregon highways (J.A. 63; Ex. 2, at 18).

As the interrogation drifted towards its conclusion, Officer Hays was caught on the horns of a dilemma. Hays knew he had enough evidence to charge Bradshaw with furnishing but he did not have probable cause to arrest Bradshaw in connection with Reynolds' death. On the tape, Hays refers to talking with another person when he shut off the recorder (J.A. 70; Ex. 2, at 24). And while the record is silent during this gap in the tape, the decision was no doubt made to reverse Officer Hays' amiable approach by accusing Bradshaw of killing Reynolds and at the same time arresting him on the violation with the hope that a confession would result. The plan backfired when Bradshaw exercised his *Miranda* rights.

Bradshaw's illegal detention is further aggravated by the fact that the record is silent as to whether he was *actually* given the opportunity to use the telephone to contact an attorney or his grandmother after his arrest.[22]

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[22] [Direct questioning by Mr. Grove, the District Attorney, of Officer Hays]:

"Q. Okay. To the best of your knowledge, would he have had an opportunity to make a phone call to a lawyer had he had the chance?

"A. Yes, at the jail, I believe. He didn't know one and he wanted to get a hold of Mrs. Stockdale, I believe, Irma Stockdale and he had a

Another relevant fact is that Bradshaw was not arraigned on the furnishing charge Monday morning but was arraigned on charges arising out of his confession after business hours at 7 p.m. when bail was increased to $25,300.

Lastly, in considering the "totality of the circumstances," it should be emphasized that on the evening of Saturday, September 13, 1980, Bradshaw was found unconscious on the ground near Reynolds' cabin and the residence where Bradshaw was staying (Tr. 134-135, 144). Bradshaw had a large laceration on the back of his head. He complained of head and chest pains and was extremely intoxicated (Tr. 135). Bradshaw, an apparent alcoholic, later told a doctor at the hospital he had consumed two and one-half fifths of whiskey (Ex. 7, p. 2).[23] Bradshaw had been drinking all day preceeding the Sunday interrogation (J.A. 47).

In reviewing the above facts under a totality-of-circumstances test, waiver of the right to counsel must be knowingly, intelligently and voluntarily made. The state must prove an intentional relinquishment of a known right. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). *Miranda* absolutely bars post-invocation/pre-waiver interrogation. Under the minority interpretation of *Edwards*, whether the arrestee of the police

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couple other things to do because I believe Mrs. Stockdale was leaving that night to go to St. Helens.

"Q. Okay.

"A. And he wanted to let them know—in fact, a police officer, I believe, went back to the—and told Mrs. Stockdale that he was in the Tillamook County Jail." (J.A. 18-19; Tr. 24-25).

The record does not disclose whether Bradshaw actually was given the opportunity to call anyone. This is corroborated by the fact that the police contacted Bradshaw's grandmother who was leaving town but never told her of her grandson's request. This left Bradshaw with no one to contact prior to the polygraph test.

[23] "Ex.7" refers to the Emergency Hospital Record.

initiated the new dialogue is an important factor. *Id.*, at 491 (Powell, J., concurring).

Additional principles apply in reviewing the waiver issue. *North Carolina* v. *Butler*, 441 U.S. 369, 373 (1979) indicated:

> "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great. . . ."

Michigan v. *Mosley*, *supra*, cautioned:

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities insistence to make a statement without counsel's presence may properly be viewed with skepticism." *Id.*, at 110, n.2. (White, J., concurring).

The state must clearly show an "affirmative waiver," *Carnley* v. *Cochran*, 360 U.S. 506, 516 (1962), that has been "specifically made." *Miranda* v. *Arizona*, *supra*, 384 U.S. at 470. A strong preference exists in favor of express waivers, but in limited cases a waiver "can be clearly inferred from the actions and words of the person interrogated." *North Carolina* v. *Butler*, *supra*, 441 U.S. at 373. A waiver will not be presumed from a silent record, *Tague* v. *Louisiana*, 444 U.S. 469 (1980). *Miranda* requires that ambiguity be interpreted against the interrogator. Finally, the Seventh Circuit has held that after a clear showing of the assertion of the right, the logic of *Miranda* requires a "proportionally clearer showing" of the waiver factors in order to establish a valid waiver. *Kennedy* v. *Fairman*, 618 F.2d 1242, 1246 (7th Cir. 1980).

In light of these principles, the state did not adduce sufficient articulable facts to rebut the strong presumption against waiver. Bradshaw did not expressly waive his right to counsel. He did not specifically indicate an intention to reopen the criminal investigation.[24] Other than saying he understood his

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[24] The readvice of *Miranda* rights before the polygraph examination on Monday morning does not establish waiver. Hays coerced Bradshaw's uncounseled agreement to take the test. Only the con-

"standing" (whatever that means in this context), Bradshaw remained mute.

As Bradshaw remained silent, Corporal Hays increased the pressure against him. Hays told Bradshaw he was arrested on the furnishing charge and told him their destination. Hays placed Bradshaw, who had been previously handcuffed, in the front seat of the patrol car in order to interrogate him. While driving to jail, Hays reaccused him of killing Reynolds in a vehicular homicide. Hays suggested he take a polygraph examination to "clear this matter up and find out actually what happened." (J.A. 17-18; Tr. 23-24). After being confronted with this calculated barrage of interrogation tactics, Bradshaw finally succumbed to the pressure. As a product of this compulsion, he "involuntarily" agreed to take the polygraph examination. On this record, the state has failed to prove a valid waiver under the totality-of-circumstances standard.

CONCLUSION

For the above reasons, the judgment of the Oregon Court of Appeals should be affirmed.

Respectfully submitted,

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sultation with a lawyer could correct the situation. Readvice of rights in this case should carry no more weight towards finding a valid waiver than the advice of rights that was given in *Taylor* v. *Alabama, supra; Dunaway* v. *New York, supra,* and *Brown* v. *Illinois, supra.*

APPENDIX A

A LIST OF NON-INITIATORY STATEMENTS

After an arrestee has asserted the right to counsel, he may make statements concerning his independent statutory and constitutional rights or concerning irrelevant matters without initiating further interrogation. To establish initiation, the state must show that an arrestee clearly and specifically reopened the substantive criminal investigation. The following list involves classes of hypothetical statements that do not constitute initiation.

I. A STATEMENT MADE AT THE ARREST SCENE OR DURING TRANSPORTATION TO THE JAIL IS NOT INITIATION IF IT IS "NORMALLY ATTENDANT TO ARREST AND DETENTION" AND NOT RELEVANT TO THE SUBSTANTIVE CRIMINAL INVESTIGATION.

A. Statements about being frisked.

B. Statements about being handcuffed.

C. Responses to an officer's instructions concerning his behavior in the patrol car.

D. Statements about defendant's physical condition.
   1. Medical symptoms.
   2. Need to urinate.

E. Statements about defendant's state of mind.
   1. Anger
   2. Concern or confusion.
   3. Paranoia.

F. Statements about environmental matters.
   1. Weather.
   2. Traffic conditions.
   3 Landscape.
   4. Condition of squad car.

G. Statements about the officer.
   1. Irrational insults.
   2. Comments concerning the officer's appearance, attitude or conduct.

H. Requests to contact other persons.
   1. Attorney.
   2. Relatives or friends.
   3. Desire to reschedule appointments.

I. Statements concerning the safekeeping of defendant's property.
   1. Defendant's personal effects.
   2. Disposition of his automobile.

J. Statements concerning procedural aspects of arrest and custody.
   1. Location of the jail.
   2. Opportunity for a phone call.
   3. Parameters of security release.
   4. Detention procedures.
      a. Meals.
      b. Visitors.
      c. Medical treatment.
      d. Conditions.
   5. Time of arraignment.
   6. Time sequence for appointment of counsel.

II. A STATEMENT MADE DURING THE BOOKING PROCESS IN WHICH A DEFENDANT DOES NOT SPECIFICALLY ASK TO REOPEN THE CRIMINAL INVESTIGATION IS NOT INITIATION.

A. Statements during intake interview.

B. Statements during identification photograph procedure or fingerprinting.

C. Statements during exchange of clothes, property inventory, search of person, seizure of physical evidence.

D. Request for a phone call.

III. A STATEMENT MADE TO A SECURITY RELEASE OFFICER IN THE ROUTINE INTERVIEW FOR RELEASE AND APPOINTMENT OF COUNSEL IN WHICH A DEFENDANT DOES NOT SPECIFICALLY ASK TO REOPEN THE CRIMINAL INVESTIGATION IS NOT INITIATION. SEE ORS 136.040.

IV. A STATEMENT MADE IN JAIL BEFORE THE ARRIVAL OF COUNSEL IN WHICH A DEFENDANT DOES NOT SPECIFICALLY ASK TO REOPEN THE CRIMINAL INVESTIGATION IS NOT INITIATION.

A. Request for telephone call.

B. Request for medical attention.

C. Request for food or cigarettes.

D. Request for reading material.

E. Complaints about jail conditions or conflicts with other inmates.

F. Questions about the procedural steps normally attendant to detention.

V. SPECIFIC EXAMPLES OF NON-INITIATORY REMARKS.

A. Well, what is going to happen to me now?

B. When may I call my lawyer?

C. When will a lawyer be appointed?

D. When will the lawyer see me?

E. When may I make a phone call?

F. May I call my grandmother?

G. May I reschedule my appointments?

H. Where are you taking me?

I. How far away is the jail?

J. Will I be able to see a doctor concerning my injured head?

K. May I be released on my own recognizance or admitted to security release?

APPENDIX B

ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 42-50 (1975)
(Excerpts)

ARTICLE 140. CONDITIONS OF INVESTIGATION DURING CUSTODY OF AN ARRESTED PERSON

Section 140.1. Permitted Investigation

Subject to the provisions of this Code and other laws, any law enforcement officer or other authorized person may

(a) question an arrested person as authorized in Section 140.8;

(b) conduct procedures designed to permit the identification of an arrested person, as authorized in Article 160.

Section 140.2. Deception as to Obligation to Make Statement

No law enforcement officer shall attempt to induce an arrested person to make a statement by indicating that such person is legally obliged to do so.

Section 140.3. Abuse, Threats, Denial of Necessities

No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise to cooperate, by subjecting, or threatening to subject, such person or any person in whom such person is interested to any form of abuse, including any practice designed to unsettle, frighten or degrade, or by depriving any arrested person of adequate food, water, medical attention, rest or other physical necessities.

Section 140.4. Unfair Inducements of Statements

No law enforcement officer shall attempt to induce an arrested person to make a statement or otherwise cooperate by

(a) questioning of such unfair frequency, length or persistence as to constitute harassment or such person; or

(b) any other method which, in light of such person's age, intelligence and mental and physical condition, unfairly undermines his ability to make a choice whether to make a statement or otherwise cooperate.

Section 140.5. Use of Drugs, Hypnosis, Polygraph or Similar Techniques

No law enforcement officer shall seek to obtain information from an arrested person by using drugs or hypnosis, or a polygraph test or other such procedure designed to determine the truthfulness of statements by body reactions, unless, after such procedure has been proposed, such person has had an opportunity to consult with counsel for a period adequate to obtain advice concerning such procedure and has consented thereto.

Section 140.6. Creating Risk of Untrue Incriminatory Statements

No law enforcement officer shall take any action which is designed to, or which under the circumstances creates a significant risk that it will, result in an untrue incriminating statement by an arrested person.

Section 140.7. Access, Consultation and Telephoning Rights

(1) *Access to an Arrested Person.* An attorney undertaking to act as counsel for an arrested person shall have prompt access to such person, by telephone, and in person on counsel's arrival at any place where such person is detained. Counsel for an arrested person shall not be prevented from staying at any such place and being allowed access to the arrested person whenever such person requests his presence. If no counsel for the arrested person is present, similar privileges must be accorded to a relative or friend of the arrested person.

(2) *Consultation and Telephoning Rights.* An arrested person shall be given reasonable opportunity from time to time during his detention to consult in private with counsel or any relative or friend present in lieu of counsel, and, upon request, to use the telephone.

Section 140.8. Conditions on Questioning Arrested Persons

(1) *No Questioning Prior to Warning or Access to Telephone.* No law enforcement officer shall question an arrested person after he has been brought to the police station or otherwise attempt to induce him to make a statement unless he has been advised by the station officer in plain understandable language

(a) that he is not obliged to say anything and that anything he says may be used in evidence against him;

(b) that he will not be questioned unless he wishes, and that he may consult a lawyer before being questioned and may have a lawyer present during any questioning; and

(c) that if he wishes to consult a lawyer or to have a lawyer present during questioning, but is unable to obtain one, he will not be questioned until a lawyer has been provided for him; such advice shall also include information on how he may arrange to have a lawyer so provided.

No law enforcement officer shall question any arrested person who has been brought to a police station until he has been afforded an opportunity to use the telephone pursuant to Subsection 130.1(5).

(2) *Waivers.* Unless an arrested person is represented by counsel, and his counsel is present or he and his counsel have consented thereto, such person shall not be questioned after he has been brought to the police station unless he waives his right to counsel in accordance with the following procedures:

(a) After giving the warnings of rights required by Subsection (1), the station officer may then inquire whether the arrested person wishes to waive his right to counsel and to make a statement or consent to questioning in the absence of counsel.

(b) If the arrested person in response to such inquiry indicates that he wishes to make a statement or consents to questioning in the absence of counsel, he shall be asked to sign a writing to that effect which the station officer shall countersign.

(c) The arrested person shall be informed that any waiver given hereunder may be revoked by him at any time.

(d) No waiver shall be sought from an arrested person at any time after he has indicated in any manner that he does not wish to be questioned or that he wishes to consult counsel before submitting to questioning.

(3) *Revocation of Waiver.* If at any time after an arrested person has waived his right to counsel pursuant to Subsection (2), such person indicates in any manner that he wishes to revoke such waiver, or that he does not wish to be questioned or to make a statement, or that he wishes to consult counsel before submitting to further questioning or making a statement, such waiver shall be deemed revoked.

(4) *Period of Lawful Questioning.* No law enforcement officer shall seek a waiver of the right to counsel from an arrested person, or question such person pursuant to such a waiver, after the later of (a) the end of the [two] hour period provided for in Subsection 130.2(1) or (b) the end of the period of screening authorized by Subsections 130.2(2) and (3).

(5) *Non-Investigative Questioning.* As used in this Code "questioning" refers to questioning designed to investigate crimes or the involvement of the arrested person or others in crimes. Compliance with the procedures for questioning set forth in this Code is not required in connection with other conversation between the arrested person and law enforcement officers.

(6) *Questioning to Obtain Information Not For Use Against Arrested Person.* A law enforcement officer may question an arrested person without complying with this Section if prior thereto the prosecuting attorney has determined that he will not use against the arrested person in any proceeding any statement obtained by such questioning or any other evidence obtained as a result of such statement. Such determination by the prosecuting attorney shall be communicated to the arrested person prior to such questioning and a written record

thereof shall be furnished to him. No statement or other evidence obtained as a result of a statement obtained pursuant to this Subsection shall be used in any proceeding against the arrested person.